Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211
	)	
Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006	)	AU Docket No. 06-30

To: The Commission

MOTION FOR EXPEDITED STAY PENDING RECONSIDERATION OR JUDICIAL REVIEW

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SUMMARY

The Commission should stay (a) the effectiveness of each of the rule changes adopted as part of its *Second Report and Order and Second Further Notice of Proposed Rule Making* (FCC 06-52), which was adopted and released in WT Docket 05-211 on April 25, 2006 ("*Second Report and Order*"), or, at a minimum, the amendments to Section 1.2111(d)(2) of its Rules set forth therein and (b) the start of the Commission's upcoming auction of advanced wireless services ("AWS-1") licenses, which is designated Auction 66, and enforcement of all associated pre-Auction 66 deadlines.

In the *Second Report and Order*, the Commission made a series of changes to its rules governing designated entity relationships and the award of competitive bidding preferences thereto. None of the new rules is limited to arrangements involving large, in-region incumbent wireless service providers as contemplated in the *Further Notice of Proposed Rule Making* in WT Docket 05-211. Instead, the new rules apply to all designated entity relationships, and they were announced merely two weeks before the short-form application deadline for Auction 66. Such action is incurably disruptive to the business plans of designated entities, and it is a violation of Section 309(j)(3)(E)(ii) of the Communications Act. The problem here is even greater, though, because many of the new rules are unsound or unreasonable.

Stay of the effectiveness of the new rules, the start of Auction 66, and the enforcement of all pre-Auction 66 deadlines is clearly warranted under well-settled precedent governing such requests. First, the Joint Petitioners will prevail on the

merits of its request. The Commission has announced sudden new rules, some of which are unsound or unreasonable, and none of which were not subject to any meaningful notice or public comment — comment that would have exposed the problems raised here and will likely expose others. The Joint Petitioners demonstrate that, at a minimum, the Commission must reconsider the amendments to Section 1.2111(d)(2) of its Rules and retain the five-year unjust enrichment schedule currently set forth therein.

The Joint Petitioners also demonstrate that Bethel Native Corporation and other designated entities will suffer irreparable harm if a stay is not granted. For example, Bethel Native Corporation lost the backing needed to bid for licenses in Auction 66 and provide service as a result of the new unjust enrichment rules and the uncertainty created by the Commission's late action. Bethel Native Corporation has been unable to find a source to replace the lost capital and expertise, leaving it unable to participate in Auction 66 as it has planned.

Meanwhile, the interests of third parties, and the public interest, favor a stay. The new rules adopted as part of the *Second Report and Order* are so new and unexpected that no party could reasonably assert that it relied on them in organizing its business relationships and obtaining financing. Though some parties might prefer to obtain AWS-1 licenses sooner rather than later, they will suffer no harm if the status quo is maintained. And, all prospective bidders and the public will benefit from an auction that is reliable and not under a threat of judicial reversal because of the Commission's action here.

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The Minority Media and Telecommunications Council ("MMTC"), Council Tree Communications, Inc. ("Council Tree"), and Bethel Native Corporation ("BNC") (together referred to hereinafter as the "Joint Petitioners") respectfully move that, pending reconsideration or judicial review of the Commission's action in this case, the Commission stay (a) the effectiveness of each of the rule changes adopted as part of its *Second Report and Order and Second Further Notice of Proposed Rule Making* (FCC 06-52), which was adopted and released in WT Docket 05-211 on April 25, 2006 ("*Second Report and Order*"), or, at a minimum, the amendments to Section 1.2111(d)(2) of its Rules set forth therein1/ and (b) the start of the

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1/ A synopsis of the *Second Report and Order* was published in the Federal Register on May 4, 2006, and the rule changes adopted therein are currently scheduled to become effective as of June 5, 2006. *See* 71 Fed. Reg. 26,245 (2006).

Commission's upcoming auction of advanced wireless services ("AWS-1") licenses, which is designated Auction 66, and enforcement of all associated pre-Auction 66 deadlines.

Short-form (FCC Form 175) applications to participate in Auction 66 are currently due to be filed with the Commission no later than Wednesday, May 10, 2006.2/ Given the short time before those applications are due to be filed, the Joint Petitioners respectfully request expedited Commission action on this motion. If the Commission does not grant the stay requested here by Monday, May 8, 2006, the Joint Petitioners intend to seek a stay in a United States court of appeals.3/

I. INTRODUCTION

In the *Second Report and Order*, the Commission made a series of changes to its rules governing designated entity relationships and the award of competitive bidding preferences thereto. Among other things, the Commission adopted a ten-year unjust enrichment schedule for licenses acquired with bidding credits,4/ instituted a new unjust enrichment provision requiring full repayment of any bidding credit in many cases where the construction requirements applicable at the

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2/ *See Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006, Public Notice*, FCC 06-47, ¶¶ 58, 62 (rel. April 12, 2006) ("*Auction 66 Procedures Notice*").

3/ By separate pleading, the Joint Petitioners respectfully petition the Commission to reconsider each of the rule changes adopted as part of the *Second Report and Order* or, in the alternative, the amendments to Section 1.2111(d)(2) of its Rules set forth therein ("Petition for Expedited Reconsideration").

4/ *See Second Report and Order* at ¶ 37.

end of the license term has not been met,5/ modified its rules relating to spectrum leasing and resale arrangements to make certain relationships involving designated entities attributable for the purposes of business size calculations or altogether impermissible,6/ and adopted new application requirements and reporting obligations applicable to designated entities.7/

None of the new rules is limited to arrangements involving large, in-region incumbent wireless service providers as contemplated in the *Further Notice of Proposed Rule Making* in WT Docket 05-211 ("*FNPRM*") that produced the record in this case. Instead, the new rules apply to all designated entity relationships. Adoption of such broadly-applicable new rules just two weeks before the short-form application deadline for Auction 66 is incurably disruptive to the business plans of designated entities, their investors, and their strategic partners. It is also a violation of Section 309(j)(3)(E)(ii) of the Communications Act.

The problem is even greater, however, because many of the rules announced at this eleventh-hour are unsound or unreasonable. In the case of the modifications to the Commission's unjust enrichment rules, for example, a ten-year unjust enrichment schedule and full prior build-out requirement for licenses acquired with bidding credits (together, the "new unjust enrichment rules") have the practical

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5/ *See id.* at ¶ 38.

6/ *See id.* at ¶¶ 25-27.

7/ *See id.* at ¶¶ 44-47.

effect of eviscerating a designated entity's access to capital by eliminating an accepted exit path if the business is not going well. This option is critical for investors who are being asked to back untested new entrants.

In addition, by their terms, the new just enrichment rules apply to *existing* designated entity relationships that were formed under, and in reliance upon, the current provisions of Section 1.2111(d)(2). The sudden and unforeseeable application of entirely new unjust enrichment requirements will completely upset those parties' good faith expectations. It will also signal to current and prospective sources of capital that the designated entity regulatory environment is not reliable for investors.

For all of these reasons, and for the reasons set forth in the accompanying Petition for Expedited Reconsideration, the Commission should set aside the new rules and retain its current rules for the licenses offered in Auction 66. At a minimum, the Commission should set aside the new unjust enrichment rules and retain the five-year unjust enrichment schedule set forth in Section 1.2111(d)(2) of its Rules.

In the meantime, so that it may reconsider and eliminate the new rules or permit time for judicial review thereof, the Commission must stay (a) the effectiveness of each of the rule changes adopted as part of its *Second Report and Order* or, at a minimum, the amendments to Section 1.2111(d)(2) of its Rules set forth therein and (b) the start of Auction 66 and enforcement of all associated pre-Auction 66 deadlines.

II. STAY OF THE EFFECTIVENESS OF THE COMMISSION'S NEW RULES, THE START OF AUCTION 66, AND ENFORCEMENT OF THE PRE-AUCTION 66 DEADLINES IS CLEARLY WARRANTED

The Commission evaluates motions for stay under well-settled precedent. To warrant a stay, a petitioner must demonstrate that (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.8/ Application of these legal and equitable principles decisively support the need for a stay here.

A. The Joint Petitioners Will Prevail on the Merits

First, as shown more fully in the accompanying Petition for Expedited Reconsideration, the Joint Petitioners will prevail on the merits of its request.

1. The Commission Must Set Aside Each of the Rule Changes Adopted in the *Second Report and Order*

As a threshold matter, the Joint Petitioners demonstrate that the Commission should set aside the rule changes adopted as part of the *Second Report and Order*, examine each such change as part of the continuation of WT Docket 05-

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8/ *See Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance, Memorandum Opinion and Order*, FCC 06-44, ¶ 16 (rel. April 13, 2006) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)); *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

211, and retain its current rules for the licenses offered in Auction 66. There are several reasons to do so. First, announcing broadly-applicable changes to designated entity rules so soon before short-form applications are due for Auction 66 throws the business plans of designated entities into turmoil. The Commission's *FNPRM* in this proceeding contemplated restrictions on the award of designated entity benefits to an otherwise qualified designated entity where it has a "material relationship" with a "large in-region incumbent wireless service provider."9/ It did not contemplate wholesale changes to longstanding designated entity rules, particularly so soon before applications are due to participate in an auction of enormous significance.

Under Section 309(j)(3)(E) of the Communications Act, in scheduling competitive bidding, the Commission is required to see that an adequate period is allowed "after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."10/ This is critical for designated entities, which must raise capital to enable them to participate in the auction in the first instance.

Here, the Commission announced fundamental and sudden rule changes, in one case affecting an unjust enrichment policy that has been settled for nearly nine-

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9/ *See FNPRM* at ¶ 5.

10/ 47 U.S.C. § 309(j)(3)(E).

years, just *two weeks* before the date on which applications are due to participate in Auction 66. Such an action is wholly destabilizing for those preparing to participate in the auction. For example, parties who have relied on the existing unjust enrichment schedule in structuring their financing arrangements will be stranded if the new rule is actually applied.

Second, the Commission should set aside the rule changes adopted as part of the *Second Report and Order* because many of them are unsound or unreasonable. For example, application of the newly-announced ten-year unjust enrichment period and full prior build-out requirement would discourage investment in designated entities. Lenders and investors who are being asked to back untested new entrants want to see that the designated entity has a clear path to exit if, for example, the business is not succeeding. A ten-year horizon is wholly inconsistent with those expectations. As a result, rather than increasing "the probability that the designated entity will develop to be a competitive facilities-based service provider," as the Commission assumed,11/ a ten-year unjust enrichment period and full prior build-out requirement would *reduce* that probability by shrinking the ranks of those willing to invest at all.

Also unreasonable are the new limitations on designated entity spectrum leasing and resale arrangements. The Commission declared that any agreement with an individual or entity to lease or resell "25 percent or more of the spectrum

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11/ *Id.* at ¶ 36.

capacity of any individual license" would be an attributable material relationship and agreements with one or more entities to lease or resell "50 percent or more of the spectrum capacity of any individual license" would be an impermissible material relationship.12/ Yet, it is not at all clear how the "spectrum capacity of any individual license" is to be measured for these purposes — particularly in the resale context that is so important to designated entities. These new rules are ambiguous to the point that a licensee may not fairly determine whether it is compliance or not.

Finally, there is a similar problem with the new reportable eligibility event rule, which requires designated entities to seek approval for "any event in which they are involved that might affect their ongoing eligibility . . . ."13/ As described in the body of the *Second Report and Order*, such "reportable eligibility events" include:

> changes in the ownership structure of the designated entity and agreements (*e.g.,* management, credit, trademark, marketing, and facilities agreements) entered into between designated entity licensees and third parties that the Commission has not previously reviewed.14/

Yet, the text of the final rule defines a "reportable eligibility event" as any spectrum lease/resale arrangement that would cause a licensee to lose eligibility for

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12/ *Id.* at ¶ 25.

13/ *Id.* at ¶ 46 (footnote omitted).

14/ *Id.* at ¶ 46 n.116.

competitive bidding preferences or "[a]ny other event that would lead to a change in the eligibility of a licensee for designated entity benefits."15/

This final rule text suggests that the instruments referred to in the body of the order ("management, credit, trademark, marketing, and facilities agreements") may now be deemed, in all cases, to "lead to a change in the eligibility of a licensee for designated entity benefits." If that is so, it is a fundamental change to many years of Commission policy and precedent regarding *de jure* and *de facto* control. If that is not so, the Commission's new rule is deeply confusing, leaving affected designated entities without a clear idea of what is expected of them.16/

In short, the Commission has announced sudden new rules, some of which are unsound or unreasonable, and none of which was not subject to any meaningful notice or public comment — comment that would have exposed the problems noted here and will likely expose others. The Joint Petitioners demonstrate that, to remedy this situation, the Commission must set aside the rule changes adopted as part of the *Second Report and Order*, examine each such change as part of the continuation of WT Docket No. 05-211, and retain its current rules for the licenses offered in Auction 66.

15/ *Id.*, Appendix B (text of new Section 1.2114(a)) (emphasis added).

16/ For example, under the new rule, it is not clear if a newly-entered management agreement would have to be submitted to the Commission if the agreement would *not* lead to a change in the eligibility of a licensee for designated entity benefits.

2. At a Minimum, the Commission Should Retain the Five-Year Unjust Enrichment Schedule Set Forth in Section 1.2111(d)(2) of its Rules

Separately, the Joint Petitioners demonstrate that, at a minimum, the Commission must address the most clearly unsound portion of the *Second Report and Order* by reconsidering the amendments to Section 1.2111(d)(2) of its Rules and retaining the five-year unjust enrichment schedule currently set forth therein. There are several reasons why.

First, contrary to the Commission's stated rationale for the rule change, a ten-year unjust enrichment schedule and full prior build-out obligation for licenses acquired with bidding credits would sharply curtail the ability of designated entities to obtain financing. According to the Commission, "extending the unjust enrichment period to ten years [will] increase the probability that the designated entity will develop to be a competitive facilities-based service provider."17/ That is not correct, however.

Without a reliable track record in the industry, a designated entity must be able to persuade banks, private equity investors, strategic partners and other backers that it has a sensible business plan on which it can perform. Lenders and investors who are asked to back a new entrant with little or no history of performance simply will not commit to provide capital unless the designated entity has a clear exit path if the business is not going well. Similarly, private equity and

17/ *Second Report and Order* at ¶ 36.

other investors frequently adhere to three to seven year investment horizons, with five being an accepted average. A designated entity undertaking to refinance at year five would have much less flexibility to do so under the new rules. Contrary to the Commission's stated view, a ten year unjust enrichment period and full prior build-out obligation *reduce* the probability that the designated entity would develop to be a competitive facilities-based service provider.

Second, the Joint Petitioners will prevail on the merits because the Commission's action here was arbitrary and capricious. An agency must articulate a rational connection between the facts found and the choice made, and that "an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem . . . ."18/ In the end, the Commission's decision must be supported by substantial evidence in the record of the proceeding.19/ That is not the case here, for the Commission changed a longstanding rule, and applied the change to existing transactions formed in reliance on the five-year schedule, without the record to support it, without any evidence of an actual problem associated with the rule, and without so much as a word regarding the profound negative impact of the change on designated entities.

18/ *Motor Vehicles Manuf. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted) (emphasis added).

19/ *See AT&T Corp. v. FCC*, 394 F.3d 933, 936 (D.C. Cir. 2005); *Melcher v. FCC*, 134 F.3d 1143, 1152 (D.C. Cir. 1998).

The five-year unjust enrichment schedule in Section 1.2111(d)(2) of the Commission's Rules was first applied by the Commission beginning in 1994 as part of at least ten different sets of service-specific competitive bidding rules. The Commission then employed that five-year unjust enrichment schedule when it standardized its Part 1 auction rules in 1997.20/ The *Second Report and Order* was based on the record developed in response to the *FNPRM* in WT Docket No. 05-211, in which the Commission "tentatively conclude[d] that we should modify our requirements regarding designated entity eligibility to restrict the award of designated entity benefits to an otherwise qualified designated entity where it has a 'material relationship' with a 'large in-region incumbent wireless service provider.'"21/

Nevertheless, in the *Second Report and Order*, the Commission did nothing with respect to "material relationships" with a "large in-region incumbent wireless service providers." Instead, the Commission suddenly adopted the new unjust enrichment rules and made them applicable to *all* existing and future designated entities. For support in the record of this dramatic and unexpected action, the Commission pointed to the comments of two parties — STX Wireless, LLC ("STX")

20/ *See Amendment of Part 1 of the Commission's Rules – Competitive Bidding, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 408-09 (1997).

21/ *FNPRM* at ¶ 5.

and MMTC.22/ The Commission's reliance on these comments is misplaced, however, because it misconstrued what the parties wrote.

As demonstrated in the accompanying Petition for Expedited Reconsideration, neither STX nor MMTC suggested that the Commission should throw out the longstanding five-year unjust enrichment schedule here. STX recommended that the Commission consider the prospect of a tougher rule to apply when a designated entity and a large incumbent wireless service provider are found to have violated the Commission's rules.23/ Likewise, MMTC certainly was not urging the Commission to throw out its five-year unjust enrichment schedule here without consideration of its impact on designated entities and with virtually no time for the parties to adjust to the change..24/

MMTC's point was, and is, that such an inquiry is needed because a much broader change would require the Commission to evaluate whether there is any actual problem under the current rule, the means-end fit between the contemplated approach to addressing any identified problem and the results of applying the new rule, and the impact of the rule change on those that it would affect. All of that is missing from the *Second Report and Order* in part because parties were not commenting on such a larger rule change. Lacking such a record from affected

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22/ *See Second Report and Order* at ¶¶ 35-36.

23/ Comments of STX Wireless, LLC at 2.

24/ Comments of MMTC at 14-15. *See also* Declaration of David Honig, Executive Director, MMTC (Petition for Expedited Reconsideration Attachment 2).

parties, the Commission wholly failed to consider an important aspect of the problem (*i.e.*, resulting impairment of designated entities' access to capital), which is precisely why the inquiry suggested by MMTC would have been appropriate.

Moreover, the change from a five-year unjust enrichment schedule to the new unjust enrichment rules applies not just to new designated entity relationships but also to existing designated entity relationships that were formed under, and in reliance on, the five-year schedule that has been set forth in Section 1.2111(d)(2) of the Commission's Rules since 1997. Thus, designated entities that long ago structured financing arrangements in reliance on the Commission's five-year unjust enrichment schedule now face a wholly changed set of requirements that would likely destroy the expectations of the parties. Nothing of that sort was contemplated or discussed in the *FNPRM*.

Third, the Joint Petitioners will succeed on the merits because the Commission failed to give adequate notice and the opportunity to be heard before it adopted the new unjust enrichment rules. Under the Administrative Procedure Act, the Commission must provide notice of any proposed rules, including the terms or substance thereof or a description of the subjects and issues involved,25/ and the opportunity for interested parties to participate in the rule making through the submission of written data, views, or arguments.26/ The Commission's action here

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25/ *Id.*, § 553(b)(3).

26/ *Id.*, § 553(c).

was neither the subject of proper notice nor the logical outgrowth of what the Commission had proposed.

The Commission's February, 2006 *FNPRM* did not purport to address a wholesale revision to all designated entity relationships or existing relationships. Instead, in the *FNPRM*, the Commission "tentatively conclude[d] that we should modify our requirements regarding designated entity eligibility to restrict the award of designated entity benefits to an otherwise qualified designated entity where it has a 'material relationship' with a 'large in-region incumbent wireless service provider.'"27/ The *FNPRM* later described Council Tree's proposal relating to unjust enrichment in that context (*i.e.*, use of the current unjust enrichment rule to enforce any new limitations involving a large in-region incumbent wireless service provider) and raised the following:

> We seek comment on whether, if we adopt a new restriction on the award of bidding credits to designated entities, we should adopt revisions to our unjust enrichment rules such as those proposed by Council Tree, or in some other manner. . . . If we require reimbursement by licensees that, either through a change of "material relationships" or assignment or transfer of control of the license, lose their eligibility for a bidding credit pursuant to any eligibility restriction that we might adopt, over what portion of the license term should such unjust enrichment provisions apply?28/

Since the Commission's current unjust enrichment rules already require reimbursement by licenses that lose their eligibility, the Commission's request for

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27/ *FNPRM* at ¶ 5.

28/ *Id.* at ¶ 20 (emphasis added).

comment was plainly, *and by its terms*, directed to the application of unjust enrichment principles as part of "any eligibility restriction that we might adopt."

Nevertheless, the new unjust enrichment rules apply to much more than the eligibility restrictions the Commission adopted in the *Second Report and Order* (*i.e.*, new limitations with respect to spectrum leasing and resale), but that possibility was not at all obvious from the language of the *FNPRM*. Indeed, nothing in the *Second Report and Order* suggested that the Commission would adopt the new unjust enrichment rules applicable to *all* existing and future designated entities. The Commission received no comments as to whether there was any actual problem to be addressed under the five-year unjust enrichment schedule, and no party had the opportunity to discuss the ways in which the new rules would so greatly impair designated entities' access to capital. It cannot fairly be said that the new unjust enrichment rules were "tested via exposure to diverse public comment."

Likewise, it cannot fairly be said that *existing* designated entities which obtained financing under and in reliance upon the current provisions of Section 1.2111(d)(2) were given notice that the five-year unjust enrichment schedule applicable to them was subject to change. The Commission cannot expect to propose to change such a fundamental rule in a way that dramatically impacts existing relationships and receive no comment on the subject. Yet, that is precisely what occurred: no party commented. That silence was not a product of indifference, it was a product of inadequate notice, revealing that the Commission failed "to ensure fairness to affected parties."

Fourth, the Joint Petitioners will prevail on the merits because changing the longstanding five-year unjust enrichment schedule at this late date would violate the Communications Act, upset business plans set for Auction 66, and undermine confidence in the stability of designated entity rules. Under Section 309(j) of the Communications Act, the Commission is required to see that an adequate period is allowed "after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."29/ This is critical for designated entities, which must raise capital to enable them to participate in the auction in the first instance.

In the instant case, however, the Commission announced a fundamental and sudden rule change, affecting a policy that has been settled for nearly nine-years, just *two weeks* before the date on which applications are due to participate in Auction 66. Parties who have relied on the existing unjust enrichment schedule in structuring their financing arrangements would be stranded if the new rule is actually applied.

Likewise, the sudden application of the new unjust enrichment rules to *existing* designated entities that obtained investment under, and in reliance on, the

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29/ 47 U.S.C. § 309(j)(3)(E).

five-year schedule would have a chilling effect on prospective investors in current and future designated entities. Designated entities undertaking to attract capital would find it difficult to persuade prospective lenders, investors, and strategic partners that the Commission rules on which their relationships would be structured are reliable.

Finally, the Joint Petitioners will prevail on the merits because the Commission is charged with promoting "the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays."30/ Here, the prospects of litigation and delay are great unless the Commission acts. The Commission has announced new rules just two weeks before the deadline to apply for a major spectrum auction. In the case of the amendments to Section 1.2111(d)(2), the Commission did not clearly notice its new rules for public comment, it based its decision on two comments that it misconstrued, it entirely failed to consider an important aspect of the problem associated with the new unjust enrichment rules, it applied these new rules to longstanding relationships formed under the five-year unjust enrichment schedule, and it completely upset business plans and financing commitments of designated entities on the eve of Auction 66. To avoid judicial delays that would freeze the deployment of AWS-1 spectrum, the Commission must act immediately to set aside

30/ 47 U.S.C. § 309(j)(3)(A) (emphasis added).

the amendments to Section 1.2111(d)(2) of its Rules and retain the five-year unjust enrichment schedule currently set forth therein.

B. BNC and Other Designated Entities Will Suffer Irreparable Harm if a Stay is Not Granted

Second, BNC and other designated entities will suffer irreparable harm if a stay is not granted. As detailed in the attached Declaration of Anastasia C. Hoffman,31/ BNC is an Alaska Village Corporation formed under the terms of the Alaska Native Claims Settlement Act ("ANCSA").32/ BNC is owned by owned by approximately 1,800 Alaska Natives of principally Yupik Eskimo descent.

To diversify the investment base from which it serves its shareholders, and to participate in the development and improvement of telecommunications services in Alaska, BNC chose to enter the telecommunications industry. BNC sees the provision of these telecommunications services as a central facet of the company's strategy for the future. However, telecommunications operations are highly capital intensive.

BNC and others were working on investments that could have given the backing needed to bid for licenses in Auction 66 and provide service when the Commission issued the *Second Report and Order*. The effect of that order on BNC has been clear. BNC's prospective partners have withdrawn from discussions as a result of the new unjust enrichment rules and the uncertainty created by the

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31/ *See* Attachment 1 hereto.

32/ *See* 43 U.S.C. §§1601 *et seq.*

Commission's late action. BNC has been unable to find a source to replace the lost capital and expertise. The nature of the new rules in the *Second Report and Order*, and the timing with which they were announced, have completely upset the business plan for participation in Auction 66.

Auction 66 represents as critical opportunity for new entrants such as BNC to become Commission licensees and to participate in the economic opportunity that licensee-status presents. In the past, the Commission has used great care to preserve settled expectations to help designated entities to attract capital and access to industry and technical expertise. Here, on the eve of the most important designated entity licensing opportunity in years, the Commission has turned the business plans of prospective applicants such as BNC on their heads.

In the absence of a stay of the new rules, BNC will not be able to participate in Auction 66 as it has planned, and its efforts to diversify the economic base from which it services its shareholders will be defeated. After the Auction 66 short-form application deadline passes, relief from the Commission's new rules will do little good for BNC and those who are similarly-situated. BNC will not be able to recover the opportunity that was in hand, and no adequate compensatory or other relief will be available at a later date. The harm to BNC is this case is irreparable, and, by all objective measures, it warrants a stay.

C. <u>The Interests of Other Parties Favor a Stay</u>

In contrast, no third party will suffer harm if a stay is granted. The result of a stay would be to delay the effectiveness of the new rules adopted as part of the *Second Report and Order* and the start of Auction 66. The new rules adopted as part of the *Second Report and Order* are so new and unexpected that no party could reasonably assert that it relied on them in organizing its business relationships and obtaining financing. Indeed, the rules were announced to the public just *two weeks* before the current Auction 66 short-form application deadline, and it is the new rules that are proving to be disruptive to existing business ventures. All parties would benefit from a regulatory environment in which important rule changes are tested and considered before they are adopted. That environment would be established by grant of the instant motion.

Likewise, potential Auction 66 bidders will not be harmed by grant of the instant motion. These bidders are also faced with applying to participate in an auction in an atmosphere that has suddenly proven to be unstable. That is precisely why Congress requires the Commission to ensure that an adequate period is allowed "after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."33/ Though some parties might prefer to obtain AWS-1 licenses sooner rather than later, they will suffer no

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33/ 47 U.S.C. § 309(j)(3)(E).

harm if the status quo is maintained. And, all prospective bidders will benefit from an auction that is reliable and not under a threat of judicial reversal because of the Commission's action here.

D. The Public Interest Favors a Stay

Finally, the public interest most clearly favors a stay in this instance. Under Section 309(j) of the Communications Act, the Commission is directed to advance a number of national interests in conducting spectrum auctions pursuant to its competitive bidding authority. These national interests include the promotion of "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,"34/ and ensuring "that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ."35/

Here, the Commission has fundamentally, and without warning, changed a central element of its regulatory regime applicable to designated entities just two weeks before the short-form application deadline for a significant auction. The

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34/ 47 U.S.C. § 309(j)(3)(B).

35/ *Id.*, § 309(j)(4)(D). The Commission is also tasked to identify and eliminate regulatory barriers facing small businesses in the ownership of telecommunications facilities and provision of services. *Id.*, § 257.

nature and timing of the sudden new rule ensures that designated entities will lose financial backing with no time to recover before having to apply for the auction, which means that the Commission has made it harder, not easier, for these designated entities to participate. This squarely undermines the achievement of the national licensing diversity and competition goals of Section 309(j), which is neither consistent with the law nor in the public interest.

Likewise, Commission is charged under Section 309(j) with promoting "the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays."36/ The valuable AWS-1 spectrum must be put to use serving consumers, and the Commission's action here threatens to delay that rollout profoundly by inviting judicial intervention.

36/ 47 U.S.C. § 309(j)(3)(A).

III. CONCLUSION

For these reasons, the Joint Petitioners respectfully move that, pending reconsideration or judicial review of the Commission's action in this case, the Commission stay (a) the effectiveness of each of the rule changes adopted as part of the *Second Report and Order* or, at a minimum, the amendments to Section 1.2111(d)(2) of its Rules set forth therein and (b) the start of Auction 66 and enforcement of all associated pre-Auction 66 deadlines.

Respectfully submitted,

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May 5, 2006

Attachment 1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211
	)	
Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006	)	AU Docket No. 06-30

State of Alaska	)		
	)	ss:	AFFIDAVIT OF ANASTASIA C. HOFFMAN
City of Bethel	)		

Affiant, being duly deposed and under oath, hereby states as follows:

1. I, Anastasia C. Hoffman, am President and Chief Executive Officer of Bethel Native Corporation ("BNC"), an Alaska Native Village Corporation organized under the terms of the Alaska Native Claims Settlement Act, 43 U.S.C. §§1601 et seq. ("ANCSA"). BNC is 100% minority-owned. Its shareholders consist of approximately 1800 individuals of principally Yup'ik Eskimo descent of whom 53% are women. Many of BNC's shareholders and their families have incomes at or below poverty line.

2. BNC is headquartered in Bethel, Alaska, a community which cannot be reached by road and which is located in the economically depressed southwestern portion of Alaska. Most of the residents of Bethel are also direct shareholders of BNC or members of their families. The performance of BNC is thus an integral part of the economic health of our community. In

addition, Western Alaska, including communities such as Bethel, has very limited telecommunications facilities, and no real broadband access for ordinary residents.

3. In providing for the creation of BNC and other Alaska Native Corporations, Congress undertook a unique social experiment. As Alaska Natives continued to suffer the grave social and economic hardships resulting from the disruption of their culture and lifestyle, they also demonstrated their legitimate claim to land in Alaska. Congress passed ANCSA to address these realities. Rather than form a system of Alaska Native reservations, however, Congress directed that Alaska Natives be enrolled as shareholders of corporations within their geographic region, and that the corporations issue to their members shares that could not be sold or otherwise pledged. Thus, Alaska Natives were propelled into the world of corporate shareholder status but with limited access to capital. They became the owners of corporations that, at the direction of Congress, hold the collective results of their settlements with the federal government. In turn, Native Corporations are assigned the task of earning profits for those shareholders and attending to the shareholders' real social and economic needs.

4. No one recognizes the importance and complexity of that task more than the governing boards of directors and managers of corporations such as BNC. At BNC, we view diversification of our limited investment capital to be crucial. We have chosen to seek opportunities in the telecommunications industry as part of this process. As with many minority-owned businesses, access to capital and expertise is a formidable hurdle for participation by small business telecommunications opportunities.

5. Cognizant of the nature of our shareholder base, the broad mission bestowed on us by Congress, and the need to diversify the economic base from which we serve our

shareholders, BNC wishes to enter into the telecommunications field. BNC appreciates the growth potential that telecommunications services provide, and it sees the provision of these telecommunications services as a central facet of the company's strategy for the future. However, entering this new industry can be very difficult. Telecommunications operations are highly capital intensive, which makes competing for valuable federal licenses against entrenched telecommunications providers especially difficult.

6. Congress recognized this reality when, as in 1993, it directed the Commission to consider a variety of measures to ensure that small businesses, rural telephone companies, and businesses owned by minorities and women are given the opportunity to participate in the provision of spectrum-based services when licenses are to be awarded through competitive bidding. In the case of BNC, this is an important opportunity, as we undertake to broaden the economic base from which we serve our shareholders.

7. An important component of our plans for entering this industry is our vision to ultimately participate in the development and improvement of telecommunications services in Alaska. Telecommunications services are critical to our shareholders and to others in the vast expanse of Alaska. This dependence stems from the unique geographic and demographic conditions in Alaska, which stretches across 586,000 square miles of wilderness. Alaska Natives generally live in regional centers such as Bethel, Barrow, Kotzebue, Nome and Dillingham, and in some 220 rural Alaskan villages scattered throughout the state, where there are virtually no meaningful road systems and very limited telecommunication facilities.

8. The FCC's Auction 66, the largest auction of spectrum in U.S. history, is a unique and crucial one-time chance for companies such as BNC to enter into the telecommunications industry. If we are deprived of an opportunity to participate in this auction, we will be

irreparably harmed because there will be no other opportunity even remotely similar for participation in the wireless industry.

9. BNC and others were finalizing agreements that would give the backing that it needs to bid for licenses in Auction 66 and provide service when the Commission issued the *Second Report and Order* in WT Docket No. 05-211. In that *Second Report and Order*, the Commission changed the unjust enrichment rules that would apply to BNC and its other investors, substituting a ten-year unjust enrichment schedule for the five-year schedule that has applied for many years. The *Second Report and Order* also instituted a new policy requiring full repayment of any bidding credit in many cases where the construction requirements applicable at the end of the license term have not been met. The Commission issued the *Second Report and Order* just two weeks before the Auction 66 application deadline.

10. The effect of that order on BNC has been clear. BNC's prospective investors have withdrawn their commitments as a result of the new unjust enrichment rules announced in the *Second Report and Order* and the regulatory uncertainty created by the Commission's eleventh-hour action. For the same reasons, BNC has been unable to find a source to replace the lost capital and expertise. Now, the Auction 66 short-form application deadline is just one week away. The nature of the new rules in the *Second Report and Order*, and the timing with which they were announced, have completely upset the business plan for participation in Auction 66.

11. We believe that we could restore some or all of the transaction on which we were working if the Commission made clear that the rules will not change as they apply to Auction 66 and the resulting licensees. If the Commission stopped the effectiveness of the new rules to the extent they would apply here, business relationships formed in reliance on the existing rules might well be preserved. If the new rules stay in place, then BNC and many minority and

women-owned companies will not have a meaningful basis to participate in Auction 66 as Congress clearly intended.

Anastasia C. Hoffman

Subscribed and Sworn to before me this 3rd day of May, 2006.

Notary Public

My Commission Expires: 10-3-09

ANNA M. DRAKE
NOTARY
PUBLIC
STATE OF ALASKA